

FILED

AUG 05 2019

HARTFORD J.D.

DO NO. X07-HHD-CV-17-6082230:

EWELINA KONOPKA	:	SUPERIOR COURT
	:	COMPLEX LITIGATION DOCKET
	:	AT HARTFORD
Plaintiffs,	:	
v.	:	
PENNY CORNER PUB, INC., et al	:	
	:	
Defendants.	:	AUGUST 5, 2019

Memorandum of Decision Granting Partial Summary Judgment

General Statutes § 31-58a requires employers to pay all employees a minimum wage. As a credit against paying that wage, General Statutes § 31-60 (b) authorizes the state Department of Labor (DOL) to regulate the use of tips—most typically given in the restaurant industry—to offset the employer’s obligation to pay that wage.

The regulation adopted is § 31-62-E3. The defendants own and operate two Connecticut restaurants called “Chicago Sam’s.” Among other things, the regulation requires them to do two things critical to this case to take a tip credit against the mandatory minimum wage:

- “record[] on a weekly basis as a separate item in the wage record” . . . “the amount received in gratuities claimed as a credit for part of the minimum fair wage.”

- “obtain weekly a statement signed by the employee attesting that he has received in gratuities the amount claimed as credit for part of the minimum fair wage.”

There is no genuine issue of material fact that the restaurants at issue did neither of the two required things described above.

The restaurants assert that they recorded the tips weekly and suggest that they complied with the first requirement because an employee might by calculation determine the thing that the regulation requires to be recorded. But this hoped for extrapolation from its employees is no substitute for actually recording the thing that the regulation requires the restaurant to record: as a *separate* item the actual amount of gratuities *claimed as a credit*. More plainly, there is no question that the restaurant workers didn't weekly *attest* to anything, including “that he has received in gratuities the amount claimed as credit.” Therefore, the plaintiffs are entitled to summary judgment on the defendants' liability for back wages calculated under the minimum wage without the tip credit.

By contrast, there is a genuine dispute over whether the restaurants may defend against penalties on the grounds of good faith attempts to educate themselves about and comply with the statute. The restaurants say one of their principals specifically read the DOL notice explaining the tip credit. The evidence shows that a company regional manager claimed experience and familiarity with the rules and that this experience and familiarity was relied on. The restaurants also claim they used a professional payroll

company they believed understood and was properly applying the rules at issue here. This is enough in the court's mind—especially where credibility is at issue— to conclude that the imposition of the substantial penalties that may apply should turn not on the dry and disputed paperwork but on the crucible of a full hearing.

On the question of penalties, summary judgment is denied to both sides.

The plaintiffs also claim that the defendants have been illegally pooling tips. Having found a violation of the regulation at issue, the court doesn't need to decide the question of whether employees were required to pool their tips with bartending employees and whether, if this was done, it is prohibited by the statute and regulations. To the extent it bears though on the question of good faith, the court finds that tip pooling is likely unregulated by the statutory and regulatory scheme.

Neither the statute nor the regulations directly address the legality of a mandatory tip pool. This should probably be enough to say that such pools aren't prohibited. After all, the pooling isn't necessarily for some nefarious purpose. The rationale for pooling appears to be that the tips of wait staff often—with respect to drink prices—reflect the work of bartenders, and that tip pooling ensures that this work behind the bar but not in front of the customer is recognized and tips allocated for it.

The plaintiffs rely for their claim on a publication called a "Basic Guide" that the state DOL once disseminated in hard copy and on the web. The guide says that "if an employer chooses to exert more than minimal control over a service person's gratuity, a

tip credit will not be allowed.” The plaintiffs claim that requiring a tip received by a server to be pooled for purposes of tipping out a bartender, is exerting more than minimal control, disallowing the tip credit.

The trouble is that the regulations—as opposed to the guide—only appear to address the exertion of control issue in distinguishing a service charge from a tip. Moreover, the DOL seems to have affirmatively withdrawn this guide from publication. Pivotaly, the guide itself says “Nothing contained herein has the force of law.”

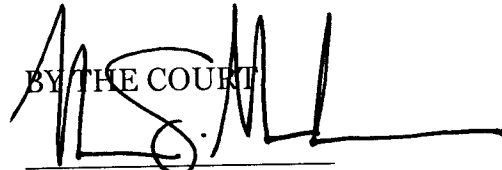
The basic guide is thus shaky ground on which to outlaw an activity that hasn’t been shown to be invariably an abuse. This is particularly so since this one-time view has never been subject to judicial scrutiny, and, without it, our Supreme Court in 2005 in *Cendant Corp. v. Commissioner of Labor* said this view is entitled to no “special deference.”¹

We can’t know why the DOL withdrew the guide, but we do know that it did, and this suggests that whatever weight the words once merited has lessened if not vanished. And even if it were still DOL policy, the Basic Guide doesn’t say explicitly that tip pooling is illegal. Therefore, to interpret it as making this practice illegal would add something to the statute and regulations that simply isn’t there. To the extent the matter has relevance here, this is all too weak to justify the court concluding that mandatory tip pooling is illegal in Connecticut.

¹ 276 Conn. 16, 26.

Summary judgment will enter for the plaintiff on the question of defendants' liability for back wages calculated under the minimum wage without the tip credit.

The defendants are ordered within 30 days of this memorandum to turn over class-wide payroll documents so that damages can be calculated.

BY THE COURT

Moukawsher, J.